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Supreme Court, U.S.
FILED

No. _____

09-324 JUL 14 2009

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In The

Supreme Court of the United States

JUDY A. WILEY,

Petitioner,

v.

HENRY M. PAULSON, JR. ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JUDY A. WILEY, *Pro Se*
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QUESTION PRESENTED

Whether the Fifth Circuit's holding that a non-Attorney should be allowed to represent a pro-se Litigant in a civil matter in conflict with the Second And Seventh Circuit in an issue on non-attorney Representative.

LIST OF PARTIES

All parties do not appear in the caption of the case On the cover page. A list of all parties to the Proceeding in the court whose judgment is the Subject of this petition is as follows:

The plaintiff, Judy A. Wiley certifies that the Following listed persons have an interest in the outcome of this case. Plaintiff/Appellant/Petitioner Judy A. Wiley. Defendants/Appellees/Respondents Henry M. Paulson Jr., Barbara Lee, and Theodore L. Reis.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix 1 to the petition and is unpublished. The opinion of the United States District Court appears at Appendix 3 to the petition.

JURISDICTION

The judgment of the United States Court of Appeals was decided on April 16, 2009. No petition for rehearing was filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves United States Constitutional Amendment [Article XIV] (1868) all persons born or Naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the Privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

2. Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. § 2000e et seq. and the Family Medical Leave Act.

3. 28 U.S.C.A. § 1654, 2.3(2) Appearance personally or by counsel in all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts, respectively are permitted to manage and conduct causes therein. § 2.3(2). Not for another: A non-attorney cannot represent someone else pro-se.

STATEMENT OF THE CASE

This is a civil rights suit. Pro-se petitioner, Judy A. Wiley, alleged cause of action for employment discrimination pursuant to (1) Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et Seq. and (2) The Family Medical Leave Act. Petitioner, an African American female is a Customer Service Representative with the Wage and Investment Business Unit (W&I) of the Dallas Internal Revenue Service both parties have retired and are being sued in their individual capacities in This cause.

The Federal District Court for the Northern District granted defendant's motion to dismiss and moved for summary judgment against petitioner on the merits that on February 3, 2004, The parties "reached an oral settlement agreement. There is a genuine issue of material fact as to defendant's Summary Judgment in violation of 28 U.S.C.A. § 1654, 2.3(2)."

It was erroneous to enter Summary Judgment in favor of defendant's thereby, such a Judgment included the existence of a conflict between two federal circuit courts of appeals on the same important matter.

REASONS FOR GRANTING THE PETITION

Reason One

The Texas Supreme Court has promulgated rules allowing others to practice law. That power is limited to the practice by (1) attorney licensed in foreign Jurisdictions, (2) bonafide law students, and (3) unlicensed graduate students who attend or attended a law school approved by the Supreme Court of Texas.

The legislature mandates against unlicensed persons to practice law is in the interest of the public welfare. It is for the public benefit and protection. This rule limiting the practice of law to trained and qualified person is founded on principle of public benefit and protection and the rule does not go beyond such principle. (See Tex. Gov. Code Ann.

§ 81.102(b). Standard for Review): also See *Powerserve Int'l v. Lavi*, 239 F.3d 508, 514 (2nd Cir. 2001).

When ruling on a Motion for Summary Judgment, the federal district court was required to view all facts and inferences in the light most favorable to the non-moving party and resolve all disputed facts in favor of the non-moving party summary judgment shall be rendered when the pleadings, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to Summary Judgment as a matter of law. (See Standard for Review, Fed.R.Civ.P. 56(c).

Reason Two

In the case at bar the Federal District Court erroneously rendered defendant's Motion to Dismiss petitioner's claim and moved for summary judgment on the merits, that, on February 3, 2004, Mr. Newton (friend to plaintiff) and Ms. Erin Timmons, the agency representative, agreed to settle the petitioner's EEOC complaint before Administrative Judge Stephanie L. Merkel of the Dallas District Office "QUOTING" Administrative Judge: Okay. Mr. Newton, is that what your client is agreeing to? Mr. Newton: Yes, your honor. It is. (See Appendix 22.)

Accordingly, even under a liberal interpretation Mr. Newton is not a licensed attorney and, may not practice law in an EEOC Administrative hearing before Judge Stephanie L. Merkel there is a genuine issue of material fact as defendant's summary

judgment. Moreover, nowhere does the record provide that Mr. Newton as plaintiff's representative, is a licensed attorney in foreign jurisdictions, or a bonafide law student, or even an unlicensed graduate student who attends or did attend a law school approved by the Texas Supreme Court. (See *Jimison by Parker v. Mann*, 957 S.W. 2d 860 (Tex. App. Amarillo 1997).

Reason Three

Thus, by allowing Mr. Newton (friend of plaintiff) appear before the Administrative Judge in The capacity as petitioner's legal representative in connection with her EEOC Administrative hearing is a miscarriage of justice and strikes any and all oral settlement agreement that would or could become binding as a result of his actions. Mr. Newton clearly engaged in the unauthorized practice law and did not hold himself out to be an attorney, or a person within the categories for whom the Texas Supreme Court has promulgated rules allowing a limited practice of law. This is also evident by reviewing Erin Timmons Declaration of oath. (The agency representative). That Mr. Newton entered into a settlement negotiation with her on behalf of petitioner acting as her legal representative in connection to petitioner's EEOC Administrative Claims at the EEOC Administrative hearing before Judge Stephanie Merkel on the morning of February 3, 2004.

The unauthorized practice of law is a proper subject for Summary Judgment. Here the Court will find explicitly that Mr. Newton engaged in a legal settlement negotiation and agreement and advised Ms. Wiley in all matters requiring the use of legal Skills and knowledge. (See *Unauthorized Practice of Law Comm. v. Cortex*, 692 S.W. 2d 47, 51 (Tex. 1985)).

Reason Four

The controlling purpose of all laws, rules and decisions for bidding unlicensed persons to practice law is to protect the public against person inexperienced and unlearned in legal matters from attempting to perform legal services for all the reasons stated in granting this petition. The federal District Court erred when it rendered in favor of defendants to dismiss petitioner's claim and moved for Summary Judgment on the merit that petitioner knowingly and voluntarily settled her claim against the defendants upon the unauthorized practice and oral agreement of Mr. Newton. Moreover, Judge Merkel did not request the qualifications of Mr. Newton and his authority to represent petitioner during the EEOC Administrative Hearing, in that she had inherent Powers to inquire into the qualifications of those persons practicing law before the Court and did not do so. When considered against the back ground of petitioner's limited formal education, her lack of legal experience and the ambiguous circumstances under which Mr. Newton oral settlement agreement has operated to vitiate petitioner's claim

of Employment Discrimination, is the effects of EEOC erroneous practice upon employment discrimination claimants. (See *Crawford v. Western Electric Co. Inc.*, 614 F.2d 1300, 1308 (5th Cir. 1980)).

Reason Five

In the adversarial system of justice, where it is necessary to balance the merits of the employee's claim of discrimination and the likelihood of success on that claim against the degree to which a proposed settlement will substantially accomplish the relief sought. Evidence of unauthorized practice of law or other improper conduct require a finding that the oral settlement was not the product of a knowing and voluntary waiver of petitioner's claim, but must be stricken from the records. Furthermore, when the unauthorized practice of law by Mr. Newton, engaged in a settlement agreement with the EEOC agency representative Erin Timmons and relinquished a substantial claim for a return promise that fails to address the substance of Petitioner's claim of discrimination but amounted to merely a little more than a promise not to retaliate against her, A duty dependent not upon any contractual relationship but arising from the provision of Title VII. 42 U.S.C. 2000e. It is asking too much to expect an aggrieved petitioner not to appeal the decision of the 5th Circuit Court of appeal when there exist, the existence of a conflict between two Federal Circuit Courts of Appeal by which review is sought against the defendants in their individual capacity.

Thereby, there exists the need to review a conflict between the 5th Circuit Court of Appeals and the 2nd and 7th Circuit Courts of Appeals that ruled against unlicensed persons to practice law to prevent a manifest injustice. A non-attorney cannot represent someone else pro se. (Citing *Powerserve Int'l v. Lavi*, 239 F.3d 508, 514 (2nd Cir. 2001); *Lewis v. Lenc-Smith Mfg.*, 784 F.2d 829, 830 (7th Cir. 1986)).

Mr. Newton was never authorized to practice law. Mr. Newton never submitted an application for general admission to practice law before a Federal Court. Mr. Newton was never scrutinized as to his qualifications to represent plaintiff in the EEOC administrative proceedings. Accordingly, the settlement agreement in this EEOC matter must be stricken. The Judgment of the 5th Circuit Court of Appeals must be reversed and this case remanded back to the Federal District Court for further proceedings. (Citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003); *Magaha v. Holmes,* 886 S.W. 2d 447 (Tex. App. – Houston [1st Dist.] 1994)).

CONCLUSION

For the above aforementioned reasons, the petition for a Writ of Certiorari Before Judgment should be granted.

Originally Filed: July 16, 2009

Dated: September 11, 2009

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
Submitted April 16, 2009

The Opinion of the United States Appeals Court for the Fifth Circuit JUDY A. Wiley v. HENRY M. PAULSON, JR., ET AL,. 08-10806 before KING, DENNIS, and OWEN, Circuit Judges PER CURIAM:*

Pro-se Plaintiff Judy A. Wiley ("Plaintiff") brought this employment discrimination suit against Defendants Henry M. Paulson, Theodore L. Reis, and Barbara Lee (collectively "Defendants") in their individual and official capacities with the Internal Revenue Service. Plaintiff alleges that defendants violated Title VII of the Civil Rights Acts., 42 U.S.C. § 2000e et seq., and the Family Medical Leave Act, 29 U.S.C. § 2611. Defendants moved for summary judgment, asserting that plaintiff waived her right to bring this suit by settling these claims during an administrative proceeding before the Equal Employment Opportunity Commission ("EEOC"). Plaintiff did not dispute that she had entered into a settlement during the EEOC proceeding, but she argued that summary judgment was improper because defendants had not fulfilled their obligations under the settlement agreement. The district court reasoned

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

that while Defendants' alleged failure to perform their settlement obligations might give Plaintiff a claim for breach of contract, it did not revive her settled claims. Thus, the district court granted summary judgment in favor of Defendants. Plaintiff timely appealed.

For essentially the same reasons stated by the District Court, we affirm the grant of summary judgment in favor of Defendants. Plaintiff voluntarily settled her claims and may not renounce her settlement agreement to bring suit for additional relief. If Defendants have not fulfilled their obligations under the settlement agreement, Plaintiff has not even obliquely alleged a breach of contract claim, so even under a liberal interpretation of Plaintiff's pleadings no breach of contract claim is before this court. Accordingly, we AFFIRM the district court's grant of summary judgment." s/".

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Submitted July 16, 2008

MEMORANDUM OPINION AND ORDER

The Memorandum Opinion and Order of the United States District Court Northern District of Texas Dallas Division. JUDY A. WILEY v. HENRY M. PAULSON, JR., ET AL., 3:05-CV-724-L

Before the court is Defendants' Motion to dismiss and for Summary Judgment, filed February 4. 2008. After careful consideration of the motion, reply, briefs, record, and applicable law, the court grants Defendants' Motion to Dismiss and for Summary Judgment.

I. Factual and Procedural Background

This is a pro se employment discrimination action brought by Plaintiff Judy A. Wiley ("Wiley") against three Defendants in their individual and official capacities with the Internal Revenue Service: John W. Snow ("Snow"),[1] Theodore L. Reis ("Reis"), and Barbara Lee ("Lee") (collectively, "defendants"). She filed the action pursuant to the Civil Rights Act of 1964 and 42 U.S.C. 1981 ("section 1981"), alleging discrimination and retaliation. On November 14,

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[1] Effective July 10, 2006, Henry M. Paulson, Jr. succeeded John W. Snow as the United States Treasury Secretary. Under Rule 25(d), Fed. R. Civ. P., Henry M. Paulson, Jr. "is automatically substituted as a party."

2006, Wiley filed an amended complaint, alleging violations of only Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. ("Title VII"), and the Family Medical Leave Act, 29 U.S.C. § 2611 ("FMLA"). Accordingly, these are the only claims before the court

Wiley is an African-American female who is currently employed as a customer service representative with the Internal Revenue Service ("IRS"). On November 27, 2002, she filed a complaint of discrimination ("EEO Complaint") alleging the following incidents of race-based discrimination:

> 1) Failure to receive compliments when given by taxpayer. 8/26/02 and 4/4/02 Barbara Lee. . . .
>
> 2) Received [counsel] memo with no prior Background. 4/19/02 Barbara Lee . . .
>
> 3) Failed to allow employee to make a 15 Minute emergency [c]all without taking annual leave. 8/23/02 Barbara Lee. . . .
>
> 4) Forced employee to sign [m]edical release Form by threatening AWOL. . . .
>
> 5) Forced employee to sign out to speak with a [u]nion [r]epresentative and EEOC counselor. 9/4/02 and 9/5/02 Barbara Lee. . . .

App. To Def.'s Mot. Summ. J.Ex. A at 4. The EEO complaint was referred to Administrative Judge Stephanie L. Merkel for hearing and decision. On January 23, 2004, the Administrative judge conducted a pre-hearing conference at which the

parties discussed the prospect of settlement. The parties were unable to reach a settlement, and the administrative judge set the EEO Complaint for hearing on February 3, 2004. Before the hearing began on February 3, 2004, the administrative judge encouraged the parties to engage in settlement discussions. The parties ultimately reached an agreement, and the administrative judge opened the record and instructed Erin Timmons ("Timmons"), Counsel for the IRS, to read the terms of the settlement agreement into the record. After Timmons read the terms of the agreement into the Record, Wiley and her attorney, Ronald Newton ("Newton"), agreed to the terms on the record. 'The parties agreed to reduce the settlement agreement to writing . Based on the parties' agreement, the administrative judge dismissed the case.

On April 14, 2005. Wiley filed this action defendants alleging discrimination and retaliation. On November 14, 2006, Wiley filed an amended complaint, alleging violations of the Title VII and FMLA. She alleges the following acts of discrimination in violation of Title VII:

(1) Defendants[s] fail[ed] to follow Employer policy, procedures, practices of IRS rules and regulations[;]

(2) Defendant[s] fail[ed] to show legitimate Justification for lowering plaintiff['s] Performance Appraisal on May 13, 2003[;]

(3) On April 4, 2002 and August 26, 2002[,] [D]efendant[s] did not give plaintiff [h]er compl[I]ments from taxpayer[;]

(4) On April 19, 2002[,] [D]efendant[s] gave Plaintiff a counseling memorandum as a mean[s] of retaliation[;]

(5) On September 4[,] 2002 and September 5, 2002[,] [D]efendant[s] required Plaintiff to sign out to speak with EEOC [c]ounselors and [u]nion [r]epresentives [where as] before, there was never any policy requiring employees to do so[;]

(6) Defendant[s] coerce[d], intimidated, And required plaintiff to sign a medical [r]elease for under duress and against her will[;]

(7) On October 9, 2003[,] [Wiley] received a Letter of reprimand as a mean[s] of retaliation and [disparate] treatment against [her] for exercising [her] rights against discrimination[;and]

(8) Defendant[s] continue to harass Plaintiff where management knew, but [failed] to take prompt medical action. As of today, after being transferred to another group, [the] problem still exist[s] today.

Pl. Am. Compl. ¶8. Wiley also alleges that defendants retaliated against her in violation of FMLA by making her absent without leave and refusing to grant her leave for which she was Eligible. *Id.* ¶11.

On February 4, 2008, Defendants filed their motion to Dismiss and for Summary Judgment. They contend that Wiley failed to exhaust administrative remedies as to claims 1,2 and 8 above and that she waived her right to sue for the remainder of the claims when she knowingly and voluntarily consented to the settlement agreement. Defendants also contend that Wiley has no private right of action to bring an FMLA claim. Defendants further contend that to the extend that Wiley alleges any constitutional or tort claims, such claims are either preempted by Title VII or barred for failure to exhaust administrative remedies with respect to those claims Defendants also argue that Reis and Lee should be dismissed from the suit and that the claims against Henry M. Paulson, Jr. in his individual capacity should be dismissed.[2]

Wiley responds that she has exhausted the administrative remedies as to claims 1,2 and 8 above because these claims are "related to allegations contained in the EEOC charge and grow [ ] out of

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[2] The court acknowledges some confusion as to the basis for Defendants' Motion to Dismiss and for Summary Judgment. The motion relies primarily on Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction); however, portions of Defendants' brief seem to argue dismissal on the basis of Fed. R. Civ. P. 12(b) (failure to state a claim upon which relief can be granted). Because the crux of Defendants' argument regarding the official-capacity FMLA claims is sovereign immunity, the court analyzes these claims to determine whether it has subject matter jurisdiction over them. As to the individual-capacity FMLA claims, the court applies the standard under Fed. R. Civ. P. 12(b)(6).

such allegations." Pl.'s Resp. ¶ 10. She also contends that although she has established a prima facie case for the Title VII violations, Defendants have failed to articulate a legitimate, nondiscriminatory reason for their actions. Wiley further contends that she has an individual right of action under FMLA because she has satisfied all legal prerequisites to bring the claim.

II. Title VII

A. Summary Judgment Standard

Summary Judgment shall be rendered when The pleadings depositions, answer to interrogatories, And admissions on file, together with the affidavits, If any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c): *Celotex Corp v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F. 3d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Boudrequx v. Swift Transp. Co., Inc.*, 402 F. 3d 536, 540 (5th Cir. 2005). Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion

for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F. 3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent Summary judgment evidence. See *Forsyth v. Barr*, 19 F. 3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F. 3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support The nonmovant's opposition to the motion for summary judgment. *Id., see also Skotak v. Tenneco Resins, Inc.*, 953 F. 2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 83 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and

unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

B. Discussion

Defendants contend that Wiley failed to exhaust administrative remedies as to claims 1,2 and 8 and that she waived her right to sue for the remainder of the claims when she knowingly and voluntarily consented to the settlement agreement. Wiley argues that she has exhausted the administrative remedies as to claims 1,2 and 8 because these claims are related to and arise from the allegations contained in the EEO Complaint. Based upon Wiley's statement that all eight claims are related to and arise from the EEO Complaint, defendants argue that all of her Title VII claims are subject to the settlement agreement and that she has waived her right to sue on these claims. The court agrees.

On February 3, 2004, the parties reached a settlement agreement, the terms of which were read into the record. The agreement was "a global settlement of any and all claims that Ms Wiley has brought or could have brought by [February 3, 2004]." App.Ex. F at 70:16-19. Both Wiley and her attorney agreed to the terms of the settlement on the record. Wiley does

not dispute the validity of the settlement agreement; she argues instead that the IRS has not fulfilled its obligations under the agreement

Voluntary settlement of employment discrimination claims is encouraged by the courts and binding on both parties. *Jackson v. Widnall*, 99 F. 3d 710,714 (5th Cir. 1996) (citing 29 C.F.R. § 1613.217(b) (1995)). "Allowing one party to renounce an agreement and sue for additional relief would undermine our longstanding policy of encouraging settlement, thereby creating a disincentive to the amicable resolution of legal disputes and defeating the purposes of title VII." *Id. See also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (noting that Title VII incorporates a strong preference for the voluntary settlement of employment discrimination claims). Because Wiley's Title VII claims have been voluntary settled, she may not renounce this agreement and sue for additional relief. If employees of the IRS have not fulfilled their obligations, Wiley's claim is one for breach of contract rather than for violations of Title VII. The alleged breach does not revive her Title VII claims and this claims are barred as a matter of law further, although a breach of contract claim could be actionable if one fails to fulfill the terms of a settlement agreement, Wiley has not even obliquely alleged such a claim in her amended complaint, much less specified which acts or omissions of defendants allegedly breach the agreement. Accordingly, even

under a liberal interpretation, no breach of contract claim is before the court.[3] There is no genuine issue of material fact as to Wiley's Title VII claims because they are barred as a matter of law. Accordingly Defendants are entitled to judgment as a matter of law on Wiley's Title VII claims.

III. FMLA

A. Standard for Dismissal Pursuant to Rule 12(b)(6)

To defeat a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1974 (2007). While a complaint need not contain detailed factual allegations, it must set forth "more that labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965 (citation omitted). The "[f]actual allegations of [a complaint] must be enough to raise a right to relief above the speculative level, on the

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[3] The court declines to allow Wiley to amend her complaint to assert a breach of contract claim because this case is over three years old and was almost three years old when she stated in her response that Defendants has not fulfilled their obligations under the settlement agreement. Moreover, Wiley has amended once, was quite specific about the claims she asserted, and made no effort to include a breach of contract claim. Allowing her to amend at this stage would cause unnecessary delay, and she has offered no explanation for not earlier attempting to include this cause of action.

assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (quotation marks, citations, and footnote omitted).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mutual Auto. Ins. Co.*, 509 F. 3d 673, 675 (5th Cir. 2007): *Martin K. Eby Constru. Co. v. Dallas Area Rapid Transit*, 369 F. 3d 464, 467 (5th Cir. 2004); *Baker v. Putnal*, 75 F. 3d 190, 196 (5th Cir. 1996). In ruling on such motion, the court cannot look beyond the pleadings. *Id.*, *Spivey v. Robertson*, 197 F. 3d 772, 774 (5th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000). The pleadings include the complaint and any documents attached to it. *Collins v. Morgan Stanley Dean Witter*, 224 F. 3d 496, 498-99 (5th Cir. 2000). Likewise, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleading if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims." *Id.* (*quoting Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F. 2d 429, 431 (7th Cir. 1993)).

The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when it is viewed in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F. 3d 305, 312 (5th Cir. 2002). A court, however, is not to strain to find inferences favorable to the plaintiff and is not to accept conclusory allegations, unwarranted deductions, or legal

conclusions. *R2 Invs. LDC v. Phillips*, 401 F. 3d 638, 642 (5th Cir. 2005) (citations omitted). The court does not evaluate the plaintiff's likelihood of success instead, it only determines whether the plaintiff has a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F. 3d 370, 376 (5th Cir. 2004).

B. Discussion

Defendants contend that Wiley has no private right of action to bring an FMLA claim and that her claim is barred by sovereign immunity. Wiley argues that she has an individual right of action under FMLA because she has satisfied all legal prerequisites to bring the claim.

Wiley sues Defendants in their individual and official capacities. If a public employee acts in the interest of an employer, the employee is an "employer" as defined in the FMLA and may be held individually liable for violations of the FMLA. *Modica v. Taylor*, 465 F. 3d 174, 184 (5th Cir. 2006). The court first addresses Wiley's FMLA claim against defendants in their individual capacities, then addresses her claim against them in their official capacities.

Wiley's FMLA claim is based on incidents that occurred in 2002 and 2003. She currently works for the IRS and does not allege that she was terminated or otherwise ceased working for the IRS between the date of the incidents and the date she filed suit. The court determines, therefore, that Wiley has worked for the IRS for over twelve months. The FMLA does

not create a private right of action for federal employees with more than twelve months of service. *Carlson v. White,* 133 Fed. Appx. 144-45 (5th Cir. 2005) (citing 5 U.S.C. §§ 6381-6387 (2007)). Accordingly, Wiley does not have a legally cognizable FMLA claim against Defendants in their individual capacities.

With respect to Wiley's FMLA claim against defendants in their official capacities, and official-capacity suit is "another way of pleading an action against an entity of which an officer is an agent. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (internal quotation marks and citation omitted). "[T]he United States is a sovereign, and as much, is immune form suit unless it has expressly waived such immunity and consented to be sued." *Herbert v. United States,* 438 F. 3d 483, 487-88 (5th Cir. 2006) (internal quotation marks and citation omitted). Because no such waiver exists for Wiley's official-capacity FMLA claim, the court lacks jurisdiction to adjudicate this claim. See *Russell v. U.S. Dep't of the Army*, 191 F. 3d 1016, 1018 (9th Cir. 1999) (holding that sovereign immunity barred suit for violation of FMLA under title applicable to federal employees with more than twelve months of service).

IV. Other Claims

Wiley includes the following language in the Damages section of her amended complaint As a direct result and [ ] proximate Result of defendants conduct[,] Plaintiff suffered the following injuries And damages[;]

> (1) Plaintiff did not receive[ ] Bonus due to plaintiff['s] Performance [a]ppraisal was lowered
>
> (2) Plaintiff suffered mental Anguish and physical sickness in the [p]ast and future, in the form of; emotional distress[,] los[s] of appetite[,] los[s] of sleep, los[ss] of weight, high blood pressure, nervousness, crying, frustration, fear[,] headaches[,] and anxiety[,]

Pl."s Am. Compl. ¶ 12. Defendants argue that to the extent that Wiley alleges any constitutional or tort claims with this language, such claims are either preempted by Title VII or barred by her failure to exhaust administrative remedies. Plaintiff alleges no such claims. She is quite specific in setting out her claims as those under Title VII and FMLA. Plaintiff then sets forth her alleged injuries and damages. The court construes this paragraph as Wiley merely describing her damages rather than attempting to allege additional causes of action. Accordingly, Defendants arguments in this regard are moot.

V. Conclusion

For the reasons stated herein, the court determines that there is no genuine issue of material fact as to Wiley's Title VII claims; that she does not have a legally cognizable FMLA claim against Defendants in their individual capacities; and that the court lacks jurisdiction to adjudicate her FMLA claim against Defendants in their official capacities. Accordingly, the court **grants** defendants' Motion to Dismiss and for Summary judgment **it is so ordered** this 16th day of July, 2008. "s/".

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Submitted July 16, 2008

JUDGMENT

This judgment of the United States District Court for the Northern District of Texas JUDY A. WILEY v. HENRY M. PAULSON, JR., ET AL., 3:05-CV-724-L This judgment is issued pursuant to the court's memorandum opinion and order dated July 16, 2008. It is therefore ORDERED, ADJUDGED, and DECREED that plaintiff Judy A. Wiley ("Wiley") take nothing against defendants Henry M. Paulson, Jr., Theodore L. Reis, and Barbara Lee; that Wiley Title VII claims are **dismissed with prejudice**; that Wiley's individual-capacity FMLA claims are **dismissed with prejudice;** that Wiley's official-capacity FMLA claims are **dismissed without prejudice** based on lack of subject matter jurisdiction; that all relief requested by Wiley is denied; and that all allowable and reasonable costs are taxed against Wiley. **Signed** this 16th day of July, 2008. "s/".

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

ORDER

Submitted on August 1, 2008

The Order of the United States District Court for the Northern District of Texas JUDY A. WILEY v HENRY M. PAULSON, JR., ET AL., 3:05-CV-724-L.

Before the court is Wiley' [Motion] for reconsideration or to Alter Judgment Pursuant [to] FRCP 5[9](e), filed July 30, 2008. After careful consideration of the motion, the court's Memorandum Opinion and Order of July 16, 2008. and the applicable law, the court **denies** Wiley's [Motion] for Reconsideration or to Alter Judgment pursuant [to] FRCP 5[9](e).

Rule 59(e) provides that a party may move to Amend or alter a judgment within ten days after entry of the judgment. Fed.R.Civ. P. 59(e). A motion to alter or amend a judgment "must clearly establish either a manifest error of law of fact or must present newly discovered evidence. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (citations omitted). These motions may not be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to entry of judgment. *See generally*, 11 C. WRIGHT, A. MILLER & M. KANE § 28 10.1 at 127-28 (2d ed. 1995): *see also Simon*, 891 F.2d at 1159 ("These motions cannot be used to raise new arguments which could, and

should, have been made before the judgment issued.").

"A district court has considerable discretion in deciding whether to grant or deny a motion to alter a judgment." *Hale v. Townley*, 45 F.3d 914, 921 (5th Cir. 1995). In exercising this discretion, a district court must "strike the proper balance between the need for finality and the need to render just decisions on the basis of all the facts." *Id* With this balance in mind, the Fifth Circuit recognizes that Rule 59(e) "favor[s] the denial of motions to alter or Amend a judgment." *Southern Constructions Group Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993).

In its Memorandum Opinion and Order of July 16, 2008, the court dismissed Plaintiff's Title VII claims with prejudice because she had previously voluntarily settled these claims, Plaintiff now argues that these claims have not been settled because she has not executed the settlement agreement. This argument lacks merit.

> Absent a factual basis rendering it invalid, and oral agreement to settle a Title VII claim is enforceable against a plaintiff who knowingly and voluntarily agreed to the terms of the settlement or authorized [her] attorney to settle the dispute. If a party to a Title VII suit who has previously authorized a settlement changes [her] mind when presented with the settlement documents, that party remains bound by the terms of the agreement.

Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5TH Cir. 1981) (internal citation omitted). In her motion, under the heading of undisputed material facts, Plaintiff sets forth portions of the transcript from the settlement hearing that confirm that both she and her attorney, on the record before and administrative law judge, agreed to settled her Title VII claims, She is, therefore, bound by the terms of the agreement, despite her refusal to execute the settlement documents.

Moreover, because plaintiff could have made this argument prior to the entry of judgment, but failed to do so, she may not make it now, The court finds no manifest error of law or fact or newly discovered evidence after having reviewed plaintiff's motion and its Memorandum Opinion and Order of July 16, 2008. Therefore, it **denies** Wiley's [Motion] for Reconsideration or to Alter Judgment Pursuant [to] FRCP 5[9](e). **It is so ordered** this 1st day of August, 2008. "s/".

UNITED STATES OF AMERICAN
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION REPORTER'S RECORD
VOLUME 1

Submitted February 5, 2004

The Transcript of Proceedings for the United States Equal Employment Opportunity Commission JUDY A. WILEY v. HENRY M. PAULSON, JR., ET AL., 03-2105.

On the 3rd day of February, 2004, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Stephanie L. Merkel, Judge presiding, held at the EEOC, 207 South Houston Street, in the City of Dallas, County of Dallas, State of Texas. Shorthand Reporter in and for the State of Texas.

APPEARANCES:

FOR THE COMPLAINANT:
MR. RONALD NEWTON
1209 North Haskell, Apartment Q
Dallas, Texas 75204

FOR THE AGENCY:
MS. ERIN EISNER TIMMONS
MR. THOMAS STANTON
Department of the Treasury
Internal Revenue Service
Office of Chief Counsel
4050 Alpha Road, 14TH Floor
Dallas, Texas 75244-4203
PHONE: 972.308.7365

PROCEEDINGS

ADMINISTRATIVE JUDGE: We're now on the record in the case of Judy Wiley versus Department of the Treasury. The parties have reached a settlement agreement in this case. I'm going to turn it over to Erin Timmons, who is the agency's representative.

She's going to read the terms of the agreement between the parties with the understanding that this agreement will be in turn documented in writing by the agency and then sent to the complainant's representative and the complainant for signature; and when it's signed by all parties, a copy will be forwarded to me.

At this time, Miss Timmons, if you would read the terms of the agreement into the record, that will serve as documentation of the agreement to this point.

Ms. Timmons: The parties have entered into a global settlement of any and all claims that Ms. Wiley has brought or could have brought by the date of the settlement agreement, which is today.

Ms Wiley has agreed to dismiss the pending EEOC complaint. That's EEOC Number 310-2003-05 516X, the Agency Number being 03-2105. The agency has agreed to change the AWOL, A-w-o-l, status on April 15th and June 10 of 2003 to leave without pay status.

The agency has also agreed to remove an October 9th, 2003 letter of reprimand from Ms. Wiley's file. The parties has agreed that the written settlement agreement will contain standard language to include a nonadmission clause by the agency and a clause indicating that the settlement agreement is nonprecedential in any other form

The parties have agreed that each party will bear its own fees and costs, if any, and the settlement will also contain language to the effect that the agency recognizes its obligation under Title VII that it shall not retaliate against its employees for exercising their EEO rights.

The agreement will also contain language indicating that Ms. Wiley recognizes her obligation to follow the appropriate IRS time and attendance procedures and to effectively manage her leave balances. Those are the essential terms of the agreement

ADMINISTRATIVE JUDGE: Okay, Mr. Newton, is that what your client is agreeing to

MR. NEWTON: Yes, Your Honor, it is.

ADMINISTRATIVE JUDGE: Miss Wiley, You're agreeing to those terms

MS. WILEY: Yes.

ADMINISTRATIVE JUDGE: All right. After The court reporter transcribes that, she will send me – the transcription to me, and I'll send it immediately to the parties, again when this is

reduced to writing. Miss Timmons, if you will, send that off to Mr. Newton. B sure you give her address

MR. Newton: Yes, ma'am.

ADMINISTRATIVE JUDGE: Once you have signed it, then when you get a completed copy, if you'll sent that to me.

MS. TIMMONS: Sure.

ADMINISTRATIVE JUDGE: The record is now closed.

(End of proceedings)

STATE OF TEXAS)
COUNTY OF DALLAS)

THIS IS TO CERTIFY THAT I, BARBY D. BLACK, a Certified Shorthand Reporter in and for the State of Texas, reported in shorthand the proceedings had at the time and place set forth in the caption hereof, and that the above and foregoing 6 pages contain a full, true, and correct transcript of the said proceedings

Certified to on this the 5th day of February, 2004. "s/".

SETTLEMENT AGREEMENT

In full, complete, and binding settlement of EEOC complaint 310-2003-05516X TD No. 03-2105, Judy Wiley v. Dept of Treasury, and any and all other claims that have been brought or could have been brought by Judy Wiley (Complainant). Against The Department of Treasury, Internal Revenue Service (Agency), in connection with her employment, prior to the effective data of this settlement, the parties hereby agree as follows:

1. The Complaint agrees to voluntarily Dismiss her Complaint in EEOC No. 310-203-05516X TD No. 03-2105 with prejudice.

2. The agency agrees to change complaintant's AWOL (absent without Leave) status on April 15, 2003 and June 10, 2003 to LWOP (leave without pay) status.

3. The Agency agrees to remove the October 9, 2003 letter of reprimand from Complainant's employee file.

4. The Agency recognizes its obligations Under Title VII not to retaliate against Employees for exercising EEO rights afforded to them.

5 Complainant recognizes her obligations to follow appropriate Agency time and attendance procedures and to effectively manage her leave balances

6. The parties shall each bear their own costs, fees and expenses, including attorney fees, if any.

7 The parties agree that this Settlement Agreement constitutes the full and complete settlement and satisfaction of EEOC No. 310-2003-05516XX, TD No.03-2105, and also a global settlement of any and all other grievances, complaints appeals and claim which the Complaint has or may have against the Agency, its employees, or agents arising before the effective date of this settlement agreement. Accordingly, Complainant agrees not to appeal or otherwise challenge the voluntary nature of this agreement, or to bring and other employment-related claim against the Agency in any forum, including, but not limited to: the negotiated grievance/arbitration process, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel and/or any federal or state court.

8. This agreement is for the parties' mutual benefit and will have no precedential value in any other forum, including, but not limited to the negotiated grievance/arbitration process, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel and federal or state Court.

9. This Settlement Agreement does not Constitute and admission of any wrongdoing or violation of any law, rule, regulation, or contract by the Agency, its agents or employees.

10. This Settlement Agreement represents the parties entire agreement. No other provisions or amendments thereto shall have any force or effect unless set forth in a writing signed and dated by both parties.

11. The Complaint agrees that she had an adequate opportunity to review this agreement and to discuss the same with any persons of her choosing before signing the same. Furthermore, all parties agree that they read, understand, and voluntarily agree to the terms of this agreement.

12. It is understood by the Complainant that the executed Settlement agreement will be forward to the discrimination Complaint Review Unit (DCRU) for the required review under section 1203(b)(3)(B) of the restructuring and Reform Act of 1998, and either party who signed the settlement agreement may be contacted about the settlement and/or the circumstances leading up to the complaint during the course of this review. It is also understood by the complainant that regardless of the outcome of DCRU's review, the complainant may not reopen the complaint, initial any administrative appeals, or obtain additional remedial relief on the matters raised in the complaint. "s/".

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Submitted 1/31/08

DECLARATION OF ERIN EISNER TIMMONS

The Declaration of Erin Eisner Timmons for The Northern District of Texas JUDY A. WILEY v HENRY M. PAULSON, JR., ET AL., 3:05-CV-0724-L ECF.

In according with the provision of 28 U.S.C. § 1746, Erin Eisner Timmons hereby makes the following declaration, under penalty of perjury, in the above-referenced case:

1. My name is Erin Eisner Timmons, I am over the age of 21, am of sound mind, have never been convicted of a crime, and am otherwise competent to testify. I have personal knowledge of the facts stated in this Declaration.

2. I currently hold the position of Senior Attorney, General Legal Services, Attorney Of Chief Counsel for Internal Revenue Service, Department of The Treasury, (hereinafter "Agency") Dallas, Texas

3. Among my duties as a Senior Attorney, I am responsible for representing the Agency in Complaints of employment discrimination filed with The Equal Employment Opportunity Commission (hereinafter "EEOC")

4. I was the representative of the Agency in the hearing process for the complaint filed by Judy A. Wiley on November 28, 2002. This complaint was

assigned a Treasury Department number of 03-2105 and an EEOC number of 310-2003-05516X (hereinafter "the Complaint")

5. The Complaint was set for a hearing before EEOC Administrative Judge Stephanie L. Merkel (hereinafter "AJ Merkel"), on February 3, 2004. The hearing was schedule to take place in person at the Dallas, office of the EEOC. The parties to the complaint were all present at the Dallas EEOC office on the morning of February 3, 2004. I was present to represent the Agency. Ms Wiley was present and also had a representative with her, Mr Ronald Newton.

6. Before the hearing began, AJ Merkel encouraged us to engage in settlement terms. We finally reached an agreement and informed the judge of our agreement.

7. AJ Merkel then asked me, Ms Wiley and Mr. Newton if we had in face reached a settlement agreement. All parties responded that an agreement had been reached. AJ Merkel then advised that we would open the hearing for the purpose of entering the settlement agreement into the record and dismissing the case.

8. AJ Merkel opened the record and instructed me to read into the record the settlement terms that had been agreed to by the Agency, Ms Wiley and Mr Newton. I read the terms as contained in the Transcript of Proceedings from February 3, 2004. Mr. Newton agreed to the terms as recited into the record. Mr Wiley agreed to the terms as recited into the record.

9. The Agency, Ms Wiley and Mr Newton also agreed to reduce to writing the settlement as recited into the record on February 3, 2004. This agreement was reached on the request of the Agency so that it could have a paper document from which to process and fulfill the settlement terms.

10. AJ Merkel closed the record on February 3, 2004 and dismissed the complaint as settled.

11. Over the next few days I attempted to obtain Ms Wiley's and Mr Newton's signatures. I was advised by both Ms Wiley and Mr. Newton that neither would sign the written version of the settlement agreement.

12. It is my understanding that AJ Merkel was contacted by Ms Wiley requesting a reopening of her complaint. I also contacted AJ Merkel to advise that I would not be forwarding a written version of the settlement agreement due to Ms Wiley's refusal to sign the document. AJ Merkel advised that the settlement agreement was already entered into the record by way of the sworn agreement on the record and that she had dismissed the case as settled

13. The Agency has fulfilled its obligations under the settlement agreement – specifically, the October 9, 2003 letter of reprimand is no longer in Ms Wiley's personal file and her absent without leave (AWOL) status has been changed to leave without pay (LWOP) for April 15, 2003. The agency was also obligated under the settlement agreement To change her AWOL status for June 10, 2003. when the Agency

attempted to do so. It discovered that Ms. Wiley had never actually been charged AWOL for the day in question and therefore did not adjust her time records for June 10, 2003.

14. I declare, pursuant to 28 USC § 1746, under penalty of perjury, that the foregoing is true and correct. "s/"